

**APPENDIX A: Court of Appeals'
Judgment**

*UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
CIRCUIT*

No. 23-1241

September Term 2023, SEC-2023-80

GUNES BIRAY, PETITIONER
v.
SECURITIES EXCHANGE COMMISSION,
RESPONDENT

Filed on: March 21, 2024

PETITION FOR REVIEW FROM
AN ORDER OF THE
SECURITIES EXCHANGE COMMISSION

BEFORE: Henderson, Millett, and Walker,
Circuit Judges

JUDGEMENT

This petition for review of an order of the Securities and Exchange Commission (“SEC”) was considered on the briefs and appendix filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the petition for review be denied. Petitioner challenges the SEC's August 25, 2023 order denying his application for a whistleblower award. However, he has not shown that information he provided to the SEC "led to the successful enforcement" of the covered action as required under 15 U.S.C. § 78u6(b)(1), and the SEC's determination to the contrary is supported by substantial evidence in the form of declarations from one of the primary enforcement attorneys assigned to the underlying investigation, see generally Doe v. SEC, 846 Fed. Appx. 1, 3-4 (D.C. Cir. 2021). Moreover, assuming that he has not forfeited the argument by failing to raise it in his response to the SEC's preliminary determination, petitioner was not eligible for an award in any related action because he was not entitled to an award in the covered action. See 15 U.S.C. § 78u-6(a)(5); 17 C.F.R. §§ 240.21F-3(b)(1) and 240.21F-11(a); Belaski v. SEC, 839 Fed. Appx. 566, 566 (D.C. Cir. 2021).

Petitioner also raises procedural objections to the SEC's handling of his information, such as allegedly rushed consideration of his submission, failure to forward the information to others within the agency, and omitting additional searches following up on his information. Whether or not any such errors occurred in the handling of the investigation, petitioner's tips were not actually used in any underlying investigative or prosecutorial action, so no whistleblower award is due.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

**APPENDIX B: Order Denying Panel
Rehearing**

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
CIRCUIT**

No. 23-1241

September Term 2023, SEC-2023-80

GUNES BIRAY, PETITIONER,

v.

SECURITIES EXCHANGE COMMISSION,
RESPONDENT

Filed on: April 17, 2024

BEFORE: Henderson, Millette, and Walker,
Circuit Judges

ORDER

Upon consideration of the petition for rehearing,
it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy, Deputy Clerk

**APPENDIX C: Order Denying Rehearing
En Banc**

*UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
CIRCUIT*

No. 23-1241

September Term 2023, SEC-2023-80

GUNES BIRAY, PETITIONER

v.

**SECURITIES EXCHANGE COMMISSION,
RESPONDENT**

Filed on: April 17, 2024

BEFORE: Srinivasan, Chief Judge, Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges

ORDER

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy, Deputy Clerk

APPENDIX D: SEC's Denial Order

UNITED STATES OF AMERICA
Before the
*SECURITIES AND EXCHANGE
COMMISSION*

SECURITIES EXCHANGE ACT OF 1934

Release No. August 25, 2023

Whistleblower Award Proceeding

File No. 2023-80

In the Matter of the Claim for the award
in connection with

*In the Matter of Murchinson Ltd.,
Marc Bistricer, and Paul Zogala,*

File No. 3-20463 (Aug. 17, 2021)

Notice of Covered Action 2021-097

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM

The Claims Review Staff (“CRS”) issued a Preliminary Determination recommending the denial of the whistleblower award claim submitted by Gunes Biray (“Claimant 1”) in connection with the above-referenced covered action (the “Covered Action”). Claimant 1 filed a timely response contesting the preliminary

denial. For the reasons discussed below, Claimant 1's award claim is denied.

I. Background

A. The Covered Action

On August 17, 2021, the Commission filed settled charges against Murchinson Ltd, its principal, Marc Bistricer and its trader, Paul Zogala (the "Respondents"), for providing erroneous order-marking information that caused executing brokers to violate Regulation SHO. In addition, Murchinson and Bistricer settled charges for causing a dealer to fail to register with the Commission.

According to the Commission's Order, from June 2016 through October 2017, the Respondents provided erroneous order-marking information on hundreds of sale orders of their hedge fund client to the hedge fund's brokers, causing those brokers to mismark the hedge funds' sales as "long."

The Commission's Order finds that the Respondents caused the hedge fund's executing brokers to violate the order-marking and locate requirements of Regulation SHO, and that Murchinson and Bistricer caused the hedge fund

¹ The CRS also preliminarily denied the award claim of Claimant 2. That claimant did not seek reconsideration of the Preliminary Determination, and therefore the denial of his/her claim was deemed to be the Final Order of the Commission under Exchange Act Rule 21F-10(f).

to violate the dealer registration requirements of the Securities Exchange Act of 1934. Among other relief, Murchinson and Bistricer were ordered to pay, jointly and severally disgorgement of \$7,000,000, with prejudgment interest of \$1,078,183. Murchinson, Bistricer, and Zogala were also ordered to pay penalties of \$800,000, \$75,000, and \$25,000, respectively. On September 30, 2021, the Office of the Whistleblower (“OWB”) posted the Notice for the Covered Action on the Commission’s public website inviting claimants to submit whistleblower award applications within 90 days. Claimant 1 filed a timely whistleblower award claim.

B. The Preliminary Determination

The CRS issued a Preliminary Determination recommending that Claimant 1’s claim be denied because Claimant 1 did not provide information that led to the successful enforcement of the Covered Action within the meaning of Section 21F(b)(1) of the Exchange Act and Rules 21F-3(a)(3) and 21F-4(c) thereunder. In his/her award application, Claimant 1 identified twenty-three tips he/she submitted to the Commission. According to the Enforcement staff responsible for the Covered Action, all of the tips other than two were closed and not sent to Enforcement staff responsible for the Covered Action because they contained vague or insubstantial information. While Enforcement staff responsible for the Covered Action received two of Claimant

1's tips, the information was not useful as it was either unrelated to the conduct that ultimately formed the charges in the Covered Action or based on publicly available information, of which they were already aware. Finally, Enforcement staff responsible for the Covered Action had no communications with Claimant 1, and to the extent he/she had communications with other Commission staff, they were not part of the Enforcement team responsible for the Covered Action.

C. Claimant 1's Response to the Preliminary Determination

Claimant 1 submitted a timely written response (the "Response") contesting the Preliminary Determination.²

In his/her request for reconsideration, Claimant 1 makes the following principal arguments: (1) that his/her claim for award is based on two particular TCRs -- TCR1498408637575 and TCR1498409608815, both dated June 25, 2017 ("June 25 TCRs") -- and claims that these "TCRs tipped the SEC about the 'naked short selling' of Dryships' shares by Kalani Investments (Kalani) and Murchison, which owns Kalani" and that Enforcement staff responsible for the Covered Action "must have received these TCRs and used them in its investigations"; (2) that the article that prompted the opening of the

² See Exchange Act Rule 21F-10(e), 17 C.F.R. § 240.21F-10(e).

investigation did not contain original information; (3) that Enforcement staff used the information in four other TCRs (TCR1499208970901, TCR1499475100109, TCR1498921901843 and TCR1497618009688) to subpoena documents from Dryships; (4) that the Enforcement staff must have received and used two other tips (TCR1497753361426 and TCR1498160212642) in connection with subpoenaing another entity (Future Tech Ltd.); and (5) that the staff identified by Claimant 1 in his/her award application (Fuad Rana and Sonia Bednarowski) with whom he/she communicated must have forwarded his/her information on to Enforcement staff responsible for the Covered Action.

II. Analysis

To qualify for an award under Section 21F of the Exchange Act, a whistleblower must voluntarily provide the Commission with original information that leads to the successful enforcement of a covered action.³ Additionally, and as relevant here, original information will be deemed to lead to a successful enforcement action if either: (i) the original information caused the staff to “commence an examination, open an investigation ... or to inquire concerning different conduct as part of a current examination or investigation” and the Commission brought a

³ See Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1).

successful action based in whole or in part on conduct that was the subject of the original information;⁴ or (ii) the conduct was already under examination or investigation, and the original information “significantly contributed to the success of the action.”⁵

In determining whether the information “significantly contributed” to the success of the action, the Commission will consider whether the information was “meaningful” in that it “made a substantial and important contribution” to the success of the covered action.⁶ For example, the Commission will consider a claimant’s information to have significantly contributed to the success of an enforcement action if it allowed the Commission to bring the action in significantly less time or with significantly fewer resources, or to bring additional successful claims or successful claims against additional individuals or entities.⁷

As an initial matter, the record shows that Claimant 1’s information did not cause

⁴ See Exchange Act Rule 21F-4(c)(1), 17 C.F.R. § 240.21F-4(c)(1).

⁵ See Exchange Act Rule 21-F-4(c)(2), 17 C.F.R. § 240.21F-4(c)(2).

⁶ Order Determining Whistleblower Award Claims, Exchange Act Rel. No. 90922 (Jan. 14, 2021) at 4; see also Order Determining Whistleblower Award Claims, Exchange Act Rel. No. 85412 (Mar. 26, 2019) at 9 (same).

⁷ See Exchange Act Rel. No. 85412 at 8-9

Enforcement staff to open the investigation. Enforcement staff confirms, in a sworn declaration, which we credit, that the investigation was opened in April 2017 based on a newspaper article, prior to any information provided by Claimant 1.⁸

The record also reflects that Claimant 1's information did not cause Enforcement staff responsible for the Covered Action to inquire into different conduct or significantly contribute to the ongoing investigation. As to the June 25 TCRs identified in Claimant 1's Response, Enforcement staff's declaration confirms that they did not receive or review those tips. Nor did Enforcement staff receive or review Claimant 1's other tips, other than TCR1499208970901, submitted on July 1, 2017, and TCR1499475100109, submitted on July 7, 2017. Enforcement staff responsible for the Covered Action confirmed that they did not use these tips in connection with their investigation and submitted a supplemental declaration affirming that they did not use the information in any of Claimant 1's tips in subpoenaing documents or information in connections with the Covered Action investigation. Finally, Enforcement staff responsible for the Covered Action confirmed that they did not communicate with the

⁸ Claimant 1's argument that the newspaper article did not contain original information is irrelevant as to whether Claimant 1' information led to the success of the Covered Action.

Commission staff identified by Claimant 1 in his/her Response concerning the conduct charged in the Covered Action. And contrary to Claimant 1's assertions, Enforcement staff responsible for the Covered Action did not receive Claimant 1's submissions from the other Commission staff with whom Claimant 1 communicated.

For these reasons, Claimant 1's information did not lead to the successful enforcement of the Covered Action.

III. Conclusion

Accordingly, it is hereby ORDERED that the whistleblower award application of Claimant 1 in connection with the Covered Action be, and it hereby is, denied.

By the Commission.

/s/

Vanessa A. Countryman
Secretary

APPENDIX E: Statues Involved

15 U.S.C. § 78u-6(b) and (c)

(b) Awards

(1) In general

In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—

(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and

(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

(2) Payment of awards

Any amount paid under paragraph (1) shall be paid from the Fund.

(c) Determination of amount of award; denial of award

(1) Determination of amount of award

(A) Discretion

The determination of the amount of an award made under subsection (b) shall be in the discretion of the Commission.

(B) Criteria

In determining the amount of an award made under subsection (b), the Commission --

(i) shall take into consideration --

(I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;

(II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;

(III) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and

(IV) such additional relevant factors as the Commission may establish by rule or regulation; and

(ii) shall not take into consideration the balance of the Fund.

(2) Denial of award

No award under subsection (b) shall be made --

(A) to any whistleblower who is, or was at the time the whistleblower acquired the original

information submitted to the Commission, a member, officer, or employee of --

- (i) an appropriate regulatory agency;
- (ii) the Department of Justice;
- (iii) a self-regulatory organization;
- (iv) the Public Company Accounting Oversight Board; or
- (v) a law enforcement organization;

(B) to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section;

(C) to any whistleblower who gains the information through the performance of an audit of financial statements required under the securities laws and for whom such submission would be contrary to the requirements of section 78j-1 of this title; or

(D) to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require.